

Loble, Bruce

From: West, Candace
Sent: Friday, May 25, 2007 2:38 PM
To: Morris, Brian
Cc: Loble, Bruce; 'Bloomquist, John'; 'Bradshaw, Stan'; 'Brown, G Steven'; 'Cusick, Mike'; 'DuBois, James'; Evans, Krista Lee; 'Franz, Holly Jo'; Gilman, Jim; 'Goffena, Bob'; Hall, Tim; 'Hedrich, Barry'; 'Josephson, Mark'; Lane, Bob; 'Miller, Jody'; 'Mueller, Gerald'; 'Slack, William'; West, Candace; 'Ziemer, Laura'; 'cmanos@montanabar.org'; Connor, John
Subject: RE: Water Adjudication - Unauthorized Practice of Law- Proposed Rules
Attachments: UnauthorizedProposal5-22-07.doc

MEMORANDUM

TO: Montana Supreme Court Justice Brian Morris
FROM: Attorney General's Office
 Department of Fish, Wildlife & Parks
 Department of Natural Resources and Conservation
RE: Proposed Rules Regarding Unauthorized Practice of Law in the Water Court
DATE: May 25, 2007

We support your goal of establishing a "bright line" for determining when claimants, objectors, and other interested persons must be represented by an attorney in Montana Water Court adjudication proceedings. We believe that this brief synopsis of the existing adjudication process, including the Department of Natural Resources and Conservation's (DNRC) performance of both pre-decree and post-decree non-adjudicatory functions, will assist the Supreme Court in its efforts to define what constitutes the unauthorized practice of law in Water Court proceedings.

The Adjudication Process. The Water Court's adjudication of pre-July 1, 1973, water rights began with the filing of claims pursuant to a Supreme Court order and Section 85-2-212, MCA (most of the 219,000 plus claims being adjudicated by the Water Court were filed on or before April 30, 1982). See Sections 85-2-221, 85-2-224, and 85-2-225, MCA. Before the Water Court issues the initial decree in a basin (after 1997 the Water Court's initial decree must be a preliminary decree), the filed claims must be examined by DNRC to identify potential issues and problems with each claim. See Section 85-2-243, MCA, and the Water Right Claim Examination Rules (W.R.C.E.R.). DNRC's examination of claims before the Water Court issues its initial decree in a basin is the "pre-decree" examination of claims described in this memorandum. The examination of claims is an administrative function of DNRC and the results are then used by the Water Court in the initial decree, primarily in the form of issue remarks that identify potential problems with a claim. This initial decree is the start of the Water Court's adjudication of claims with notice and an opportunity for objections to claims in the initial decree. After the Water Court has issued its initial decree, DNRC may, at the direction of the Water Court, become involved in the "post-decree" examination of claims described in this memorandum. See, e.g., Sections 85-2-237 & 85-2-248, MCA, and Water Right Adjudication Rules (W.R.Adj.R.) 12 & 13. DNRC's post-decree examination functions may include meetings with claimants during enforcement of initial decrees by a district court. See W.R.Adj.R. 31 and the statutes cited in that rule.

The Attorney General's, DFWP's and DNRC's Rule Proposal. The attached rule proposal recognizes that adjudication participants (claimants, objectors, and other interested persons) do **not** have to be represented by legal counsel in meetings or discussions with DNRC because DNRC personnel do not perform any adjudication functions under Title 85, Chapter 2, Part 2, MCA. Water Judges and Water Masters, starting with the initial decree, adjudicate claims, decide issue remarks, hear objections, and adopt or reject settlement agreements under Title 85, Chapter 2, Part 2, MCA. Consistent with this Court's recent decision in *Commission on Unauthorized Practice v. O'Neil*, 2006 MT 284, 147 P.3d 200, 334 Mont. 311, the attached rule proposal requires that litigants, other than individuals appearing *pro se*,

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must be represented by legal counsel when they appear before or submit pleadings to a Water Judge or a Water Master who is adjudicating water right issues related to a pre-July 1, 1973, water right claim.

The attached proposal and Chief Water Judge Loble's March 27, 2007, proposed rules expressly affirm the right of an individual to appear *pro se* in all phases of Water Court proceedings. However, Judge Loble's rule proposal allows Water Court litigants, including corporations, to be represented by non-lawyers or corporate officers in "initial" Water Court proceedings after an initial decree is issued. Judge Loble's proposed rules 16(a) and 16(c) only require parties not appearing *pro se* to be represented by an attorney **after** a Water Master or a Water Judge adjudicating a claim issues a "hearing track order" later in the proceedings. We believe that our attached rules are consistent with *O'Neil, supra*, while Judge Loble's proposed rule 16(a) would allow non-lawyers to represent others and file pleadings in Water Court proceedings until such time as a "hearing track" order is issued under proposed rule 16(c).

DNRC's Pre-Decree Meetings/Discussions With Claimants. Before the Water Court issues the initial decree in a basin, DNRC examines each claim in the basin under the Supreme Court's W.R.C.E.R. to identify problems and issues that cannot be resolved based on the filed statement of claim. During DNRC's pre-decree examination of claims, DNRC and a claimant may discuss by phone or meet to address problems or issues. These pre-decree meetings include the opportunity for claimants to fine tune their claims either by amendment or withdrawal. A claimant, including a non-human entity such as a corporation, is not required to be represented by an attorney during pre-decree meetings/discussions with DNRC and a claimant can be represented by a non-lawyer in these pre-decree meetings/discussions with DNRC. After DNRC meets with a claimant and/or the claimant's representatives, however, it is the claimant's responsibility to file any required documents with DNRC or the Water Court to effectuate desired changes in a claim and to comply with the applicable requirements governing the submission of pleadings to the Water Court, including the laws, rules, and court decisions governing the unauthorized practice of law in judicial proceedings. If only one owner of a water right meets with DNRC, the claimant, not DNRC, is responsible for obtaining the necessary signatures of the other co-owners. Specific forms for amending or withdrawing a claim can be found in Exhibits C and D of the Supreme Court's 2006 Water Right Claim Examination Rules. The attached rule proposal does not change or affect existing DNRC policies or processing guidelines concerning DNRC meetings/discussions with claimants or their representatives.

DNRC's Post-Decree Information Gathering. After the initial decree is issued by the Water Court, DNRC generally uses the same pre-decree procedures described in the preceding paragraph when it meets with claimants, objectors, and other interested persons. DNRC's post-decree meetings include the process described in Section 85-2-248 (5), MCA (the Water Court must send all claimants whose claims contain unresolved issue remarks to "confer with the department in an informal effort to resolve" the issue remarks). Exhibits C and D to the W.R.C.E.R are also used to resolve issue remarks and objections after a decree has been issued by the Water Court. Claimants do not have to be represented by an attorney in post-decree meetings or discussions with DNRC Adjudication Specialists and a claimant can be represented by a non-lawyer in these post-decree meetings with DNRC. However, claimants are responsible for filing any necessary legal documents with the Water Court and for complying with the applicable requirements for submission of pleadings to the Water Court, including the laws, rules, and court decisions governing the unauthorized practice of law in judicial proceedings. DNRC usually files a report of its post-decree meeting with the Water Court and a copy of the DNRC report must be served on the parties to the Water Court adjudication proceeding. *See, e.g.,* Section 85-2-248(5)(b), MCA, and W.R.Adj.R. 12. The DNRC report includes its findings and recommendations and can be used by the Water Court to dispose of issue remarks or decide other matters at issue in the adjudication proceedings. In a post-decree report filed by DNRC under Section 85-2-248(5)(b), MCA, the report must advise the Water Court whether an issue remark can be resolved with the claimant.

The Water Court also conducts post-decree enforcement proceedings, which have been described by the Water Court as a "test drive" of a decree already adjudicated by the Water Court. Although a particular district court actually enforces initial decrees, the Water Court continues to accept amendments and withdrawals of claims in post-decree enforcement proceedings and DNRC, subject to the direction and supervision of the Water Court, is often asked to gather additional information as part of that process. DNRC uses the same post-decree procedures described in the preceding paragraph in performing its non-adjudicatory information gathering functions when initial decrees are being enforced.

We urge the Supreme Court to adopt the attached "bright line" rules clearly establishing that:

1. Meetings/discussions between DNRC and interested persons, both pre- and post-decree, are not subject to the unauthorized practice of law prohibitions reaffirmed in *O'Neil, supra*, because DNRC personnel do not perform any adjudicatory functions under Title 85, Chapter 2, Part 2; and

2. Appearances before and the submittal of pleadings to Water Judges and Water Masters who adjudicate claims and issue remarks, hear objections, and accept or reject settlement agreements are subject to the unauthorized practice of law prohibitions reaffirmed in *O'Neil, supra*.

Thank you for your thoughtful consideration of this matter.

Candace West
Attorney General's Office

Robert N. Lane
Department of Fish, Wildlife & Parks

Steve Brown
Counsel for Fish Wildlife & Parks

Tim D. Hall
Department of Natural Resources and Conservation

c: Enclosure
Chief Water Judge Bruce Loble
Chris Manos, Executive Director, State Bar of Montana
John Connor, Chairman, Commission on Unauthorized Practice
All Persons on the Water Court's Public Notice List

**PROPOSED RULE LANGUAGE REGARDING THE
UNAUTHORIZED PRACTICE OF LAW**

5/22/07

ADD TO WATER RIGHT CLAIM EXAMINATION RULES:

Rule 47. Attorney Representation Not Required in Conferences With Department Claims Examination Personnel. An individual authorized to speak for a claimant as an agent or representative, including an agent or representative who is not licensed to practice law in Montana, may meet or confer with department claims examination personnel to review, discuss and exchange information for the resolution of issues related to a water right claim in accordance with the Water Right Claim Examination Rules and Section 85-2-243, MCA. Meetings or conferences between department claims examination personnel and an agent or representative who is not licensed to practice law in Montana does not constitute the unauthorized practice of law.

RETAIN EXISTING W.R.Adj.R. 16 AS SHOWN BELOW RATHER THAN DELETE (AND JUDGE LOBLE'S MARCH 27, 2007 RULE 16 LANGUAGE REJECTED):

RULE 16. SETTLEMENT CONFERENCES AND MEDIATION. The water court may require parties to participate in settlement conferences or may assign the matter to a mediator. In the event the water court assigns an outside mediator, the parties shall share and pay the expense of hiring the mediator as directed by the water court.

ADD TO WATER RIGHT ADJUDICATION RULES:

RULE 33. ATTORNEY REPRESENTATION

Rule 33(a). When Attorney Representation Required. Except when a natural person appears *pro se*, only an attorney licensed to practice law in

Montana (or an attorney who is admitted *pro hac vice*) may represent a party or submit pleadings, including but not limited to, filing withdrawals of claims or objections, motions, or stipulations, in water court proceedings before a water master or a water judge who adjudicates a water right claim after a decree is issued by the water court, including enforcement decree proceedings conducted under W.R.Adj.R. 31.

Rule 33(b). When Attorney Representation Not Required. An individual authorized to speak for a claimant as an agent or representative, including an agent or representative who is not licensed to practice law in Montana, may meet or confer with department claims examination personnel to review, discuss and exchange information for the resolution of issues related to a water right claim in accordance with the Water Right Claim Examination Rules, § 85-2-243, MCA, or §85-2-248, MCA. Meetings or conferences between department claims examination personnel and an agent or representative who is not licensed to practice law in Montana does not constitute the unauthorized practice of law. However, nothing in these rules or the Water Right Claim Examination Rules authorizes, requires, or obligates department claims examination personnel to prepare and submit settlement documents on behalf of a claimant, an individual or an entity to resolve legal issues related to a water right claim.

Rule 33(c). Rules of Professional Conduct. It is not a violation of Rule 5.5 of the Montana Rules of Professional Conduct for an attorney to meet or confer with an individual and any agent or representative authorized to speak for a claimant, including an agent or representative who is not licensed to practice law in Montana, for the purpose of reviewing, discussing, exchanging information, or recommending resolution of factual or legal issues related to a water right claim in accordance with the Water Right Claim Examination Rules, the Water Right Adjudication Rules, § 85-2-243, MCA, or §85-2-248, MCA.